

In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. See 86 Ill. Adm. Code 1940 and 130.2075. (This is a GIL).

December 30, 1999

Dear Xxxxx:

This letter is in response to your letter dated November 10, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

We are writing to request an opinion from the Illinois Department of Revenue regarding several issues as they pertain to transactions involving telecommunications towers. The first issue deals with the actual purchase of the towers. The second issue concerns the leasing of tower space.

Our client is a multistate company in the business of constructing and purchasing towers on which are placed antennae for use in transmitting signals for companies in the telecommunications industry. These towers are generally attached to foundations or footings at a fixed site, and are not designed to be mobile or moved from location to location.

The majority of our client's customers are cellular telephone companies. These companies will pay a fee to our client, who in turn grants these companies access to a specific tower (or set of towers) in order to allow the customer to place an antenna on the tower. In most cases a single tower will support multiple antennae, from several communications companies.

Our client is not in the business of selling telecommunications services, and does not sell telecommunications equipment. They are strictly in the business of leasing tower space to companies in the telecommunications industry. Any repair or maintenance of the towers is the responsibility of our client, and not the telecommunications companies. Additionally, our client does not sell or lease the antennae placed on the towers. The customers leasing the tower space own the antennae.

Purchase of Towers:

Illinois Regulation Section 130.101 states the following:

The Retailers' Occupation Tax Act (Ill. Rev. Stat. 1989, ch. 120, pars. 440 et seq.) imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. The tax is measured by the seller's gross receipts from such sale made in the course of such business.

The statute quoted above indicates that sales tax is due only on the sale of **tangible personal property**. Additionally, Illinois Regulation Section 130.120(b) states, 'The tax does not apply to receipts from sales of real property, such as lands and buildings that are permanently attached to the land.'

Based on the above, we feel that the towers purchased by our client should be properly classified as real property, and therefore, the purchase of such towers by our client should not be subject to Illinois sales or use tax.

Lease of Tower Space:

According to 35 Illinois Compiled Statutes Section 105/2 sale at retail is defined as, 'any transfer of the ownership of or title to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased for a valuable consideration...'. Based on this definition, we believe that a lease of tower space is not subject to Illinois retailers' occupation tax because a transfer of title or ownership of the tower itself does not take place. Our client's customers are paying for the ability to adhere their own property to the towers. They are not receiving title to or possession of the towers.

We believe our client is providing right of access to its towers to businesses selling telecommunications services. Therefore, based on this regulation, the charges our client extends to its customers for leasing space on towers should not be subject to Illinois retailers' occupation tax.

In light of the information presented above, we are requesting that the Department of Revenue examine our client's situation and offer its opinion as to the sales tax treatment of these transactions so that we might advise our client as to the proper course of action.

Should you have any questions regarding this request or desire any further information, please do not hesitate to contact me at ####. Thank you for your assistance and cooperation in resolving this issue. We look forward to your reply.

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property at retail. A "sale at retail" is any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Sales of real estate are not subject to tax. See the enclosed copies of 86 Ill. Adm. Code 130.101 and 130.201.

Please find enclosed copies of 86 Ill. Adm. Code 130.1940 and 130.2075 regarding the tax liabilities of contractors in Illinois. The term "construction contractors" includes general contractors, subcontractors, and specialized contractors such as landscape contractors. The term "contractor" means any person or persons who are engaged in the occupation of entering into and performing construction contracts for owners. In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. See 86 Ill. Adm. Code 1940 and 130.2075. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. Therefore, any tangible personal property that general contractors or subcontractors purchase that will be permanently affixed to or incorporated into real property in this State will be subject to Use Tax. If contractors did not pay the Use Tax liability to their suppliers, contractors must self-assess their Use Tax liability and pay it directly to the Department.

When a tower is built that is permanently attached to real estate, the construction contractors building such tower must pay Use Tax on the cost price of the tangible personal property they are going to affix.

Please note that the State of Illinois taxes leases of tangible personal property differently for Retailers' Occupation Tax and Use Tax purposes than the majority of other states. For Illinois sales tax purposes, there are two types of leasing situations: conditional sales and true leases.

A conditional sale is usually characterized by a nominal or one dollar purchase option at the close of the lease term. Stated otherwise, if lessors are guaranteed at the time of the lease that the leased property will be sold, this transaction is considered to be a conditional sale at the outset of the transaction, thus making all receipts subject to Retailers' Occupation Tax.

A true lease generally has no buy out provision at the close of the lease. If a buy out provision does exist, it must be a fair market value buy out option in order to maintain the character of the true lease. Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. See the enclosed copy of 86 Ill. Adm. Code 130.220. As end users of tangible personal property located in Illinois, lessors owe Use Tax on their cost price of such property. The State of Illinois imposes no tax on rental receipts. Consequently, lessees incur no tax liability.

The above guidelines are applicable to all true leases of tangible personal property in Illinois except for automobiles leased under terms of one year or less, which are subject to the Automobile Renting Occupation and Use Tax found at 35 ILCS 155/1 et seq.

If no tangible personal property is leased, then no tax liability is incurred. In other words, if the towers are considered to be real estate, their lease is not subject to tax as immediately described above.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.